

REMARKS

- (1) A Request for Continued Examination (RCE) has been requested with the appropriate Transmittal Letter (PTO/SB/30 (02-09)) and filed on even date herewith.
- (2) Claims 1-10 are pending in this Application.
- (3) New claims 11-23 have been appended hereto.
- (4) Claims 1, 9, 17 and 21 are independent.
- (5) Claims 1-10 have been amended hereby.
- (6) The Examiner has indicated that: "The amendment filed 8/6/2009 has been entered."
- (7) The Applicants bring to the Examiner's attention that the claims 1-10, as substantially disclosed herein, issued as European Patent No. EP 1694576 B1 on February 27, 2008; a copy of which is cited in the Information Disclosure Statement (IDS) filed herewith.
- (8) The Applicants respectfully propose that with the Amendments made hereinabove to the Claims, together with the Remarks contained hereinbelow, this Application is in condition for allowance; and, notice to that effect is earnestly solicited hereby.

Administrative

(1) It should be noted that the attorneys associated with Customer No. 28752 are newly associated with this Application. The Applicants respectfully request that the Examiner amend the record to reflect the new Attorney Docket No.: **BRYER.P020** noted herein.

(2) A copy of the Power of Attorney appointing attorneys associated with Customer No. 28752 is timely attached hereto.

Nature of the Examination

In submitting this Response to the Final Office Action and the RCE, the Applicants are necessarily relying on the completeness of the Examiner's current and past actions as per 37 CFR § 1.104(a)(1), which states that:

On taking up an application for examination ... the examiner shall make a thorough study thereof and shall make a thorough investigation of the available prior art relating to the subject matter of the claimed invention. The examination shall be complete with respect both to compliance of the application ... with the applicable statutes and rules and to the patentability of the invention as claimed, as well as with respect to matters of form, unless otherwise indicated.

and on § 1.104(b), which states in part that:

The examiner's action will be complete as to all matters, ...

And the associated MPEP sections.

Rejection under 35 USC §102

(1) The Examiner has rejected claims 1-10 under 35 USC 102(b) as being anticipated by U.K. Patent Application No. GB 2158424 A, filed March 18, 1985 for Piergiacomo Guala (hereinafter referred to as "*Guala*").

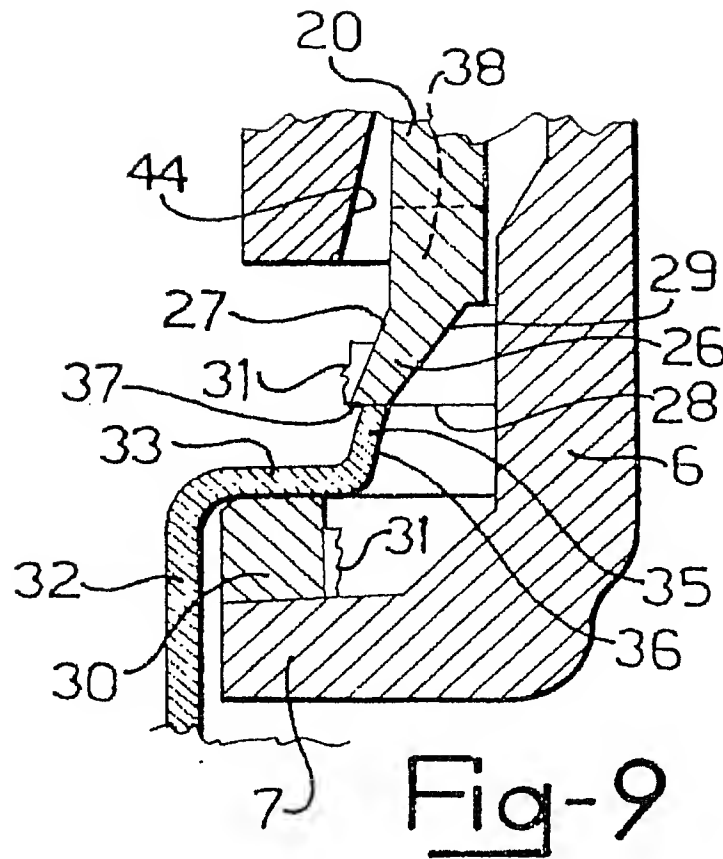
(1)(a) With respect to claim 1, in making the rejection, the Examiner has stated that:

In re claim 1, with reference to Figs. 7-10 below, *Guala* discloses: A tamper-evident closure (1) for a container, the closure comprising: a first portion (6, 18, 20, 39) including an inner (6) and outer part (18, 20, 39); and a second portion (30), the outer part (18, 20, 39) being movable relative to the inner part (6) (see Figs. 8 and 9) from a first position in which the outer part is immediately adjacent the second portion (30, see Fig. 8) to a second position in which there is an unobstructed gap (see Fig. 9) therebetween about the entire periphery of the outer part and the second portion, the inner and outer parts being constructed and arranged to become irreversibly locked in the second position so that the outer part cannot be moved back to the first position to close the gap. Note that the gap is considered to be unobstructed in the areas between each of the plurality of ratchets 38.

The Applicants respectfully submit that the gap of *Guala*, as posited by the Examiner as being formed by the ratchets, is neither taught nor described in the *Guala* disclosure. It is merely asserted by the Examiner as implicit and is therefore (again asserted by the Examiner) described in terms of its surroundings. These assertions are respectfully traversed as not literally existing in the sole reference. Those literal surroundings, as identified in FIG. 9 of *Guala*, and as further described on page 3, lines 9-38 of *Guala* teach that:

As the unscrewing of the assembly constituted by the stopper cover 39 and the stopper 18 is started, the rupturable links 31 are broken and the projection 26 is therefore separated and removed from the ring 30. This ring 30 is in fact retained on the pourer body 3 and the bottle 2 by the presence of the band 32. (*Guala* at page 3, lines 31-38).

Thus, based on the teaching of *Guala*, and as is clearly evident in a review of FIG. 9 in particular, the gap of *Guala* is solely disclosed as and necessarily obstructed when an opening of the container has occurred. The rupturable links 31, which are actually within the “gap” of *Guala* as defined by the Examiner, are broken after a first opening of the container by a user. The breaking of the rupturable links 31 cause the projection 26 to be separated and removed from the ring 30 (which sits below the “gap”), but otherwise they are held in place because of the band 32. This action necessarily obstructs the “gap” of *Guala* within in the meaning of the Applicant’s claims by causing the separated projections 26 to be held in view within the “gap”.



Thus, the “gap” of *Guala* as defined by the Examiner, is not the claimed unobstructed gap of the Applicants and application thus including at least one limitation in the claim not clearly or fairly shown in the reference is allowable for that reason alone.

The Applicants respectfully direct the Examiner’s attention to FIG. 2 of the instant Application wherein the gap (designated by “G”) is fairly illustrated in the Applicant’s lexicography for purposes of appeal. And, as is taught by the Applicant:

Continued turning of the outer part 45 eventually leads to the ratchet members 40, 49 passing each other and locking in the position shown in Figs. 2 and 3. The outer and inner parts 45, 35 are now irreversibly locked in this second position. It will be seen that there now exists a gap (G) between the open end of the outer part skirt 47 and the second portion 30. The gap (G) is empty and unobstructed; that is, the gap (G) is not created by an obstruction structure which braces between the skirt 47 and second portion 30. (*Specification at page 5, lines 25-31*).

The Applicants respectfully submit that the Examiner is using impermissible hindsight to change, interpret, modify, or intuit the Applicants' own lexicographical description and definition of the gap (G) as described above, so as to include any unobstructed gap. This is impermissible. The gap of the Applicants is specifically defined as: "... between the open end of the outer part skirt 47 and the second portion 30. The gap (G) is empty and unobstructed; that is, the gap (G) is not created by an obstruction structure which braces between the skirt 47 and second portion 30."

Further, the Examiner has stated that:

... Applicant argues that the gap as described in *Guala* is different from the claimed gap in that the gap of *Guala* may be removed by a simple cutting operation. Examiner asserts that the gap of *Guala* prevents the cutting of the locking mechanism in as much as [sic] the claimed invention in that the locking mechanism is located at a point inwards of the gap. If the applicant insists that the locking mechanism of *Guala* may be overcome by cutting, the same could be said [sic] the claimed invention which would not distinguish the claimed structure and function from the prior art of record.

The Applicants respectfully disagree with the Examiner's interpretation of the thrust or intent of the Applicants' statement or "insistence". Such an assertion is not proper under an assessment of §102 and associated CFR and MPEP sections. Element 27 of *Guala* (inclined dorsal surface of projection 26) clearly inclines into the "gap" of *Guala*, while element 31 (rupturable link), mounted on element 27, extends from the surface of the projection 26 further into the "gap" of *Guala*. The Applicants seasonably and respectfully contend that if elements 26 and 31 of *Guala* were to be cut (literally) from the "gap" of *Guala* by a container user, so as to render the gap unobstructed, then the cap would be able to be reseated in the first position. Thus, the ability to cut the obstruction of *Guala* is not a patentable claim of the Applicants; rather, it is a distinction that goes directly to the non-anticipation of the claimed gap (G) of the Applicants and the inapplicability of the 102 rejection.

Additionally, the Examiner has stated, with respect to the gap, that:

With regards to there being "an unobstructed gap therebetween about the entire periphery of the outer part and the second portion," examiner interprets "about" to mean around or in the proximity of. The gap of *Guala* is clearly in the proximity of the periphery of the second portion, and therefore, meets the limitation of the claim.

Applicant is their own lexicographer unless the Examiner can seasonably propose that Applicant's language is repugnant to the common meaning. The Applicants respectfully submit that the defined gap of the Applicants, in utilizing "about the periphery" have established a clear context, illustrated in FIGs. 1 and 2, that preclude the Examiner's interpretation that the word "about" means "in the proximity of" clearly avoids the reference. Nevertheless, the Applicants have more fully made amendment to claim 1, hereinabove, to more match the U.S. claim styles and distinctly claim the subject matter that the Applicants regard as the invention.

Further, it is unclear at which Specification the Examiner is referring when the Examiner notes that: "... the gap is considered to be unobstructed in the areas between each of the plurality of ratchets 38". The "murkiness" is evident because neither the Applicants' Specification, nor *Guala*, have taught or disclosed "ratchets 38". The applicants' 38 is defined as "screw threads" (Specification at page 4, line 30); and, *Guala*'s element 38 is labeled as a "plurality of spaced apart apertures" (*Guala* at page 2, lines 28-29). Thus, again the point is illustrated that the definitions as taught in their respective Specifications must be utilized to define the elements of the claims.

Request. To the end of establishing specific definitions within their proper context, the Applicants respectfully request that the Examiner provide an executed Declaration or Affidavit as sufficient evidence of record as an expert in the art, for the purposes of any Appeal or Circuit action, as to the definition of a gap as taught by *Guala*. The request is being made because the Examiner-proposed "gap" of *Guala* is not literally described by *Guala*; rather, the definition has been offered only by the Examiner, an impermissible position based upon the evidence of record. Such a Declaration or Affidavit would provide evidence reviewable by a trier of fact in combination with Applicant's own supporting Declarations or Affidavits as to the clear lexicography of the application.

To initially support a rejection under 35 USC 102(b), the Examiner must show that each of the elements of the Applicant's claimed invention were literally anticipated by the cited prior art. The Applicant respectfully submits that the prior art cited by the Examiner (*Guala*), does not teach nor anticipate, at least the gap of the Applicants' claimed invention (absent impermissible interpretation or modification of the reference).

The Applicant respectfully submits that they traversed, and overcome, the Examiner's rejection of claim 1 under 35 USC 102(b) as being anticipated by *Guala* and request notice to this effect.

(1)(b) Claims 2-8 have been amended to maintain the consistency of certain claiming conventions and no new matter has been appended thereby.

As to dependent claims 2 through 8, the Applicants respectfully submit that claims 2-8 enjoy the allowability of their parent claim 1 as is discussed in the Remarks hereinabove; and, therefore, the Examiner's rejection of claims 2-8 under 35 USC 102(b) as being anticipated by *Guala* has been traversed in part and overcome in part.

(1)(c) With respect to claim 9, in making the rejection, the Examiner has stated that:

In re claim 9, with reference to Figs. above, *Guala* discloses: in combination a container (2) and a tamper evident closure (1), the combination comprising: a first portion (6, 18, 20, 39) including an inner (6) and outer part (18, 20, 39); and a second portion (30), the second portion being connected to the container and the first portion being a removable top cap (39) (page 1, lines 111-112), the first portion outer part being movable relative to the inner part from a first position in which the outer part (18, 20, 39) is immediately adjacent the second portion (30) (page 3, lines 34-35) (see Fig. 8) to a second position in which there is an empty, unobstructed gap therebetween (see Fig. 9) about the entire periphery of the outer part and the second portion (as in re claim 1 above), wherein in the second position the first portion (6, 18, 20, 39) is removable (page 2, lines 87-88) and the inner (6) and the outer parts (18, 20, 39) are constructed and arranged to be irreversibly locked in the second position, so that the outer part cannot be moved back to the first position to close the gap when the first portion is replaced (page 1, lines 53-54).

As with the Remarks in regard to claim 1, and incorporating those remarks in responding to the rejection of claim 9, the Applicants respectfully submit that the gap of *Guala*, as posited and necessarily interpreted by the Examiner as being formed by the "ratchets", is neither literally disclosed, taught nor described in the *Guala* disclosure. It is merely argued by the Examiner, and is therefore described in terms of its surroundings. Those surroundings, as identified in FIG. 9 of *Guala*, and as further described on page 3, lines 9-38 of *Guala* teach that:

As the unscrewing of the assembly constituted by the stopper cover 39 and the stopper 18 is started, the rupturable links 31 are broken and the projection 26 is therefore separated and removed from the ring 30. This ring 30 is in fact retained on the pourer body 3 and the bottle 2 by the presence of the band 32. (*Guala* at page 3, lines 31-38).

Thus, based on the teaching of *Guala*, and as can be seen by a review of FIG. 9 in particular, the gap of *Guala* is necessarily obstructed when an opening of the container has occurred a clear violation of the requirements of Applicant's independent claims. The rupturable links 31, which are within the "gap" of *Guala* as defined by the Examiner, are broken after a first opening of the container by a user. The breaking of the rupturable links 31 cause the projection 26 to be separated and removed from the ring 30 (which sits below the "gap"), but otherwise held in place because of the band 32. This action necessarily mandates obstruction of the "gap" of *Guala* as dictated by the Applicant's lexicography, by causing the separated *Guala* projections 26 to be held in view within the "gap".

Thus, the "gap" of *Guala* as defined by the Examiner, is not the unobstructed gap of the Applicants. The Applicants again respectfully direct the Examiner's attention to FIG. 2 of the instant Application wherein the gap (designated by "G") is illustrated. As is taught by the Applicant:

Continued turning of the outer part 45 eventually leads to the ratchet members 40, 49 passing each other and locking in the position shown in Figs. 2 and 3. The outer and inner parts 45, 35 are now irreversibly locked in this second position. It will be seen that there now exists a gap (G) between the open end of the outer part skirt 47 and the second portion 30. The gap (G) is empty and unobstructed; that is, the gap (G) is not created by an obstruction structure which braces between the skirt 47 and second portion 30. (*Specification at page 5, lines 25-31*).

The Applicants respectfully submit that the Examiner is using impermissible hindsight to change the Applicants' definition of the gap (G) as described above, so as to include any unobstructed gap. The gap of the Applicants is specifically defined as: "... between the open end of the outer part skirt 47 and the second portion 30. The gap (G) is empty and unobstructed; that is, the gap (G) is not created by an obstruction structure which braces between the skirt 47 and second portion 30."

Further, the Examiner has stated that:

... Applicant argues that the gap as described in *Guala* is different from the claimed gap in that the gap of *Guala* may be removed by a simple cutting operation. Examiner asserts that the gap of *Guala* prevents the cutting of the locking mechanism in as much as [sic] the claimed invention in that the locking mechanism is located at a point inwards of the gap. If the applicant insists that the locking mechanism of *Guala* may be overcome by cutting, the same could be said [sic] the claimed invention which would not distinguish the claimed structure and function from the prior art of record.

The Applicants respectfully disagree with the Examiner's interpretation of the thrust or intent of the Applicants' statement or "insistence". Element 27 of *Guala* (inclined dorsal surface of projection 26) clearly inclines into the "gap" of *Guala*, while element 31 (rupturable link), mounted on element 27, extends from the surface of the projection 26 further into the "gap" of *Guala*. The Applicants respectfully contend that if elements 26 and 31 of *Guala* were to be cut (literally) from the "gap" of *Guala* by a container user, so as to render the gap unobstructed, then the cap would be able to be reseated in the first position. Thus, the ability to cut the obstruction of *Guala* is not a patentable claim of the Applicants; rather, it is a distinction that goes directly to the non-anticipation of the claimed gap (G) of the Applicants.

Additionally, the Examiner has stated, with respect to the gap, that:

With regards to there being "an unobstructed gap therebetween about the entire periphery of the outer part and the second portion," examiner interprets "about" to mean around or in the proximity of. The gap of *Guala* is clearly in the proximity of the periphery of the second portion, and therefore, meets the limitation of the claim.

The Applicants respectfully submit that the defined gap of the Applicants, in utilizing "about the periphery" have established a context, illustrated in FIGs. 1 and 2, that preclude the Examiner's contention that the word "about" means "in the proximity of". Nevertheless, the Applicants have made amendment to claim 9, hereinabove, to more distinctly claim the subject matter that the Applicants regard as the invention.

To initially support, or sustain, a rejection under 35 USC 102(b), the Examiner must show that each of the elements or steps of the Applicant's claimed invention were anticipated by the cited prior art. The Applicant respectfully submits that the prior art cited by the Examiner (*Guala*), does not teach nor anticipate, at least the gap of the Applicants' claimed invention.

The Applicants respectfully submit that they have traversed the Examiner's rejection of claim 9 under 35 USC 102(b) as being anticipated by *Guala*.

(1)(d) Claim 10 has been amended to maintain the consistency of certain claiming conventions and no new matter has been appended thereby.

As to dependent claim 10, the Applicants respectfully submit that claim 10 enjoys the allowability of its parent claim 9 as is discussed in the Remarks hereinabove; and, therefore, the Examiner's rejection of claim 10 under 35 USC 102(b) as being anticipated by *Guala* has been traversed.

(2)(a) New dependent claims 11-16, depending from claim 1 and its progeny, have been appended hereto so as to more completely claim the tamper evident closure of claim 1.

(2)(b) New independent claim 17 has been appended hereto so as to more completely claim the system employing the tamper evident closure.

(2)(c) New dependent claims 18-20, depending from claim 17 and its progeny, have been appended hereto so as to more completely claim the system of claim 17.

(2)(d) New independent claim 21 has been appended hereto so as to more completely claim the gap defined by the system employing the tamper evident closure.

(2)(e) New dependent claims 22-23, depending from claim 21 and its progeny, have been appended hereto so as to more completely claim the gap defined by the system of claim 21.

(3) Based on the Remarks made hereinabove, the Applicants respectfully submit that they have traversed the rejection by the Examiner of claims 1-10 under 35 USC 102(b) as being anticipated by *Guala*.

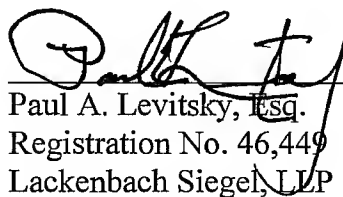
Applicant respectfully submits that claims 1-23 are allowable for at least the reasons noted hereinabove. A Notice of Allowance is therefore respectfully requested hereby.

The Commissioner is hereby authorized to charge any fees which may be necessary for the consideration of this communication, or any additional fees required during examination of this application, and to credit any overpayment to Deposit Account No. 10-0100 (Attorney Docket No. BRYER.P020).

Respectfully Submitted

March 2, 2010

Date

A handwritten signature in black ink, appearing to read "Paul A. Levitsky", is written over a horizontal line.

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